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IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1984

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES AND STEVEN W. HAMM, CONSUMER ADVOCATE FOR THE STATE OF SOUTH CAROLINA,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the District of Columbia Circuit affirming the FCC's end user access charge orders conflicts with this Court's decision in Smith v. Illinois Bell Telephone Company?

2. Whether the decision of the District of Columbia Circuit affirming the sufficiency of the FCC's notice and comment proceedings was a departure from the procedural requirements of section 205(a) of the Communications Act of 1934?

PARTIES

Petitioners, the National Association of State Utility Consumer Advocates (NASUCA) and South Carolina Consumer Advocate (SCCA), incorporate by reference the parties to the proceeding before the U.S. Court of Appeals for the District of Columbia listed in the Petition for a Writ of Certiorari filed by the National Association of Regulatory Utility Commissioners (NARUC).

The National Association of State Utility Consumer Advocates (NASUCA) consists of the following member states:

Alabama - Office of Attorney General (Consumers' Utility Counsel Section)

Arkansas - Office of Attorney General (Consumer Utilities Rate Advocacy Division)

Arizona - Residential Utility Consumer Office

Colorado - Office of Consumer Counsel

Connecticut - Consumer Counsel (Division of Consumer Counsel)

Delaware - Office of the Public Advocate

District of Columbia - Office of Peoples Counsel

Florida - Office of the Public Counsel

Georgia - Consumers' Utility Counsel

Hawaii - Department of Regulatory Agencies (Division of Consumer Advocacy)

Illinois - Governor's Office of Consumer Services and Office of Attorney General (Public Utilities Division)

Iowa - Office of Consumer Advocate

Kentucky - Office of Attorney General (Consumer Protection Division)

Maine - Office of the Public Advocate

Maryland - Office of Peoples Counsel

Massachusetts - Department of Attorney General (Public Protection Bureau - Utilities Division)

Michigan - Department of Attorney General

Minnesota - Office of Attorney General

Missouri - Public Counsel of Missouri

Nevada - Attorney General's Office of Advocate of Customers of Public Utilities

New Jersey - Department of the Public Advocate (Division of Rate Counsel)

New York - New York State Consumer Protection Board (Utility Intervention Office) and Attorney General's Division for Energy and Utilities

North Carolina - North Carolina Utilities Commission (Public Staff)

Ohio - Office of the Consumers' Counsel

Pennsylvania - Office of Consumer Advocate

South Carolina - Office of Consumer Advocate (Department of Consumer Affairs) (Steven W. Hamm, President of NASUCA)

South Dakota - Attorney General's Office

Texas - Office of Public Utility Counsel

Utah - Utah Committee of Consumer Services

Virginia - Office of Attorney General (Division of Consumer Counsel)

Washington - Attorney General's Office (Public Counsel Section)

West Virginia - West Virginia Public Service Commission (Consumer Advocate Division)

Wisconsin - Citizens' Utility Board

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Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The National Association of State Utility Consumer Advocates (NASUCA) and South Carolina Consumer Advocate (SCCA) within the South Carolina Department of Consumer Affairs jointly petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered on June 12, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is attached as Appendix A to NARUC's Petition for a Writ of Certiorari. The Federal Communications Commission's access charge order is reported at 93 F.C.C. 2d 241 (1983). The Commission's order on initial reconsideration is reported at 48 Fed. Reg. 42,984 (1983). The Commission's order on further reconsideration is reported at 49 Fed. Reg. 7,810 (1984). NARUC has previously filed one complete set of the FCC's orders with this Court.

JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit was entered on June 12, 1984. This

petition was filed within ninety days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1254(1).

STATUTES AND REGULATIONS

The full text of authoritative statutory provisions are set forth in the Appendix.

STATEMENT OF THE CASE

Petitioners NASUCA and SCCA hereby adopt and incorporate by reference the Statement of the Case set forth by NARUC. In addition, Petitioners inform the Court that they unsuccessfully advocated the two arguments comprising the Reasons for Granting the Writ, inter alia, before the District of Columbia Circuit.

REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT CONFLICTS WITH THIS COURT'S DECISION IN SMITH V. ILLINOIS BELL TELEPHONE COMPANY.

The Communications Act of 1934 establishes the FCC's jurisdiction to regulate interstate and foreign communications, expressly reserving "charges,

classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service" to the States. 47 U.S.C. sec. 151, 152(b). The FCC and the State Utility Commissions exercise their jurisdictional responsibilities over certain telephone investment and expenses which may be used jointly for interstate and intrastate services. The process of allocating these investments and expenses between the state and federal jurisdictions is known as "Separations". The separations process allocates a local exchange company's Non-Traffic Sensitive (NTS) investment and expenses between the state and federal jurisdictions and finds its genesis in this Court's decision in Smith v. Illinois Bell Telephone Co., 282 U.S. 133 (1930).

Prior to the Smith decision and codification of the separations process in 47

U.S.C. sec 410(c), most local telephone companies did not receive compensation from interstate carriers for the local telephone companies' costs incurred in originating and terminating toll calls. Due to the inability physically to divide the jointly used local telephone company investment between local (intrastate) and interstate usage, the costs of the jointly used local exchange property[1] were allocated entirely to the intrastate service and no portion was recovered from AT&T. This method of cost recovery, known as "board-to-board" ratemaking, was utilized by Illinois Bell and a number of other States'

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[1] The local exchange property used jointly for intrastate and interstate calls was defined in Smith v. Illinois Bell as "the property used at the subscriber's station and from that station to the toll switchboard, or to the toll trunk lines...." 282 U.S. at 150.

utility commissions at the time of Smith v. Illinois Bell.[2]

In Smith v. Illinois Bell, the appellant, Illinois Commerce Commission, attacked the "board-to-board" ratemaking methodology employed by Illinois Bell, arguing that the Company's method was improper since the subscribers' station and other local exchange facilities which were classified by the company as intrastate, were in fact also used in the origination and termination of interstate calls. The appellants maintained, therefore, that AT&T should properly reimburse Illinois Bell for its use of the local exchange facilities to complete interstate calls.

The alternative ratemaking theory

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[2] See, Re Indiana Telephone Co., P.U.R. 1922C 348 (Ind.); Michigan State Telephone Co., P.U.R. 1923A, 30 (Mich.); Re Northwestern Bell Telephone Co., P.U.R. 1922C, 762 (Minn.); Buck v. New York Tel. Co., P.U.R. 1921E, 798 (N.Y.).

advanced by the appellants in Smith v. Illinois Bell was called "station-to-station" ratemaking. "Station-to-station" ratemaking apportions the costs of exchange plant between exchange and toll service. It is conceptually supported by the fact that all plant from the originating to the terminating telephone station, as well as local switching, are used and necessary in order to complete toll calls.

This Court in Smith v. Illinois Bell concurred with the appellant's contention that some separation of the local exchange plant was necessary to relieve exchange ratepayers of the inequitable burden of subsidizing toll service:

> While the difficulty in making an exact apportionment of the property is apparent, and extreme nicety is not required, only reasonable measures being essential, it is quite another matter to ignore altogether the actual uses to which the proper is put. It is obvious that, unless an apportionment is made, the intrastate service to which the exchange property is allocated will bear an undue burden ....

282 U.S. at 150-151. (Citations omitted; emphasis added).

Moreover, the Court emphasized that separation of a local exchange company's facilities between intrastate and interstate investment, expenses, and revenues was jurisdictionally "essential to the appropriate recognition of the competent governmental authority in each field of regulation." Id. at 148. The Smith v. Illinois Bell decision thus emphatically marked the abandonment of "board-to-board" ratemaking and held that, for the purposes of fixing fair and reasonable rates for interstate and intrastate service, the local exchange carrier must be reimbursed from within the interstate jurisdiction for the use of local exchange facilities by the interstate carriers.

The FCC's Access Charge Order reallocating Non-Traffic Sensitive (NTS) costs[3]

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[3] The FCC's Access Charge Order describes NTS as follows:

back to local exchange customers through a flat charge that is a condition precedent to obtaining local service, Id. at para. 5, constitutes nothing short of a reimposition of the same "board-to-board" ratemaking theory rejected by this Court. The FCC has nullified the very reasons separations was implemented, i.e., to abandon the inequities of "board-to-board" ratemaking, thereby avoiding the inclusion of all loop costs (NTS costs) in what otherwise amounts to an

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> 90. Exchange plant that an end user or subscriber would need in order to use any local or long distance service is often described as non-traffic sensitive or NTS plant because the cost of providing such equipment does not vary with usage. NTS encompasses all equipment that a subscriber would need to access the local exchange switch including terminals and other customer premises equipment, the protection block and drop wire and the line or loop between the customer's premises and a local exchange switch or a manual switchboard.

Access Charge Order, at para. 90. This definition corresponds to the jointly-used local exchange plant defined in Smith v. Illinois Bell. See, supra, n. 1.

interstate local exchange rate. The Access Charge Order clearly acknowledged the applicability of Smith v. Illinois Bell in properly allocating the costs between the interstate and intrastate jurisdiction.

> It is the separations process that determines what costs must be recovered from the interstate jurisdiction ....

Access Charge Order, at para. 13. Despite this admission by the FCC that the separations process is essential to equitable cost recovery, the FCC concluded that Smith v. Illinois Bell is not violated where the majority of NTS costs[4] assigned to the interstate jurisdiction are recovered through flat per-line charges that are assessed upon all end users as a precondition to obtaining local service.

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[4] Fixed costs assigned to the interstate jurisdiction for customer premises equipment, inside wiring and a universal service fund are to be recovered via "carrier's carrier charges" on interstate carriers. Access Charge Order, at para. 3.

The FCC's attempt to avoid the mandate of Smith v. Illinois Bell was erroneously premised on a jurisdictional rationale:

> The Court merely attempted to ensure that state or federal regulators did not exceed the limits of their respective powers when they determine economic and social policy questions that have been entrusted to their judgment.

Access Charge Order, at para. 60. The D.C. Circuit violated the mandate of Smith v. Illinois Bell in much the same manner.

The Court first recognized that "(i)n Smith v. Illinois Bell Telephone Co., 282 U.S. 133 (1930), the Supreme Court decided that, because local plant is used for interstate calls, an appropriate percentage of local plant costs should be placed within the jurisdiction of federal rather than state regulators." NARUC v. FCC, No. 83-1225, slip op. at 21, NARUC Appendix A at 21. The Smith v. Illinois Bell Court, however, went further to state that:

> The proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction .... (T)he validity of the order of the state commission can be suitably tested only by an appropriate determination of the value of the property employed in the intrastate business and of the compensation receivable for the intrastate service under the rates prescribed.

282 U.S. at 149 (Emphasis added).

Hence Smith v. Illinois Bell unequivocally required that: (1) there be an allocation of jointly used local exchange property between the interstate and intrastate jurisdictions based approximately on "the actual uses to which the property is put", 282 U.S. at 151, and (2) the recovery of NTS costs by the local exchange company must be recovered from the respective jurisdictions to which these costs flow.

The D.C. Circuit, like the FCC, erroneously limits Smith v. Illinois Bell to the first criteron stated above:

> Smith dealt with jurisdiction; it held that a portion of the costs of local subscriber plant may be recovered only

> under the authority of a body with interstate regulatory powers. The Smith Court did not address the manner in which the federal agency was to perform its task. It did not hold that the FCC must order recovery of costs allocated to its jurisdiction through usage-based charges.

NARUC v. FCC, No. 83-1225, slip op. at 37-38, NARUC Appendix A at 37-38.

The D.C. Court chose to distinguish Smith v. Illinois Bell by emphasizing that Smith did not mandate that common costs allocated to the interstate jurisdiction be recovered on a usage-sensitive basis. This point is dictum and clearly provides no legal basis for the FCC's abandonment of Smith and the reimposition of the costs and associated revenue requirement allocated by Smith to the interstate jurisdiction back to the intrastate jurisdiction for recovery.[5]

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[5] The method of recovering the allocated interstate costs was not a central issue in Smith v. Illinois Bell. However, it

The crucial issue, ignored by the D.C. Circuit, is that Smith requires the allocated interstate costs to be recovered from the interstate jurisdiction. The FCC's imposition of the interstate NTS costs on the local exchange ratepayers as a precondition to obtaining local service is essentially an

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should be noted to the Court that the flat per-line end-user access charge imposed by the FCC is based on nationwide, average, interstate NTS costs. Access Charge Order, at para. 25. Noted economist Alfred E. Kahn had these recent observations on systemwide average costs as a basis for computing access charges:

> There are undoubtedly differences among the costs (average as well as marginal) of providing subcategories of these services - by type of customer, location, time-of-day, whatever - sufficiently great that basing the rates for customer access, local measured usage, and interexchange usage on systemwide average costs does excessive violence to both reality and the dictates of economic efficiency.

Kahn, The Next Steps in Telecommunications Regulation and Research, 114 Pub. Util. Fort. 13, at 16 (July 19, 1984) (Emphasis added).

increase in intrastate rates designed to recover interstate costs. The FCC unequivocally acknowledges that:

> a flat monthly charge reflecting interstate subscriber loop costs would represent an increase in the total fixed charge that a (local, intrastate) subscriber must pay in order to receive local, exchange service.

Reconsideration Order, at para.8. This additional intrastate charge violates Smith's mandate that allocated interstate costs be recovered from the interstate jurisdiction. Practically speaking, the inequitable interstate toll subsidy imposed upon local ratepayers that Smith was designed to cure has been abrogated by the FCC and D.C. Circuit.

In sum, the FCC's Access Charge Order, endorsed by the D.C. Circuit, essentially repeals the mandate of Smith that a local telephone company's allocated interstate costs must be recovered from the interstate jurisdiction. The D.C. Circuit opinion

directly conflicts with the decision of this Court in Smith v. Illinois Bell. NASUCA and SCCA respectfully request that this Court exercise its certiorari jurisdiction and overrule the decision of the D.C. Circuit.

B. THE FCC'S PRESCRIPTION OF RATES AND REVENUE REQUIREMENTS WITHOUT AN EVIDENTIARY HEARING OF RECORD WAS AN UNPRECEDENTED DEPARTURE FROM THE PROCEDURAL REQUIREMENTS OF SECTION 205(A) OF THE COMMUNICATIONS ACT OF 1934.

Petitioners NASUCA and SCCA alternatively petition this Court to accept jurisdiction of the instant case on the ground that the FCC's prescription of rates and revenue requirements in its Access Charge Order was accomplished in violation of the "full opportunity of hearing" requirement of 47 U.S.C. sec 205(a).[6] See, Rules of the Supreme Court of the United States, Rule

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[6] See Appendix for full text of 47 U.S.C. sec. 205(a).

17(1)(a).[7] Title 47 U.S.C. sec. 205(a) provides in pertinent part:

> Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or ... what classification, regulation, or practice is or will be just, fair and reasonable....

47 U.S.C. sec 205(a) (Emphasis added).

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[7] Rule 17(1)(a) states in pertinent part:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> > (a) When a federal court of appeals... has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

The Access Charge Order, based upon absolutely no evidentiary record, represents an unprecedented prescription of rates (charges) in terms of revenue requirement magnitude. Consider the huge revenue requirement and rates outlined by the FCC.

> The amount of money that will have to be recovered through the access tariffs is immense. The revenue requirement for interstate NTS exchange plant alone will be approximately 8.5 billion dollars in 1984, the first year of our plan. An additional amount of approximately 2.5 to 3 billion dollars will be required to recover the costs of traffic sensitive plant for the first year. Based upon the assumption that 100 million lines will be in use in 1984 (an assumption we consider to be reasonably accurate), this translates into a total revenue requirement per access line of approximately $8.50 per month for NTS costs and $3.50 to $3.00 per month for traffic sensitive costs. In its first year the plan would assign $4.00 per line per month or $4.35 billion [8] overall in interstate NTS costs to be recovered directly from the end used by his or her

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[8] This number ($4.3 billion) appears to have changed to $3.5 billion based upon certain assumptions and projections made by the FCC. See Reconsideration Order, at para. 117.

> local telephone operating company. Of this amount a minimum of $2.00 for residential subscribers and $4.00 for business subscribers would have to be recovered through the use of a flat charge.[9]

Access Charge Order, at para. 25 (Emphasis added).

The FCC's notice and comment proceedings in the instant case were procedurally insufficient to meet the "full opportunity for hearing" requirement of section 205(a). This conclusion is based on the fact that prior FCC and D.C. Circuit cases unequivocally mandate a trial type evidentiary hearing under section 205(a) prior to the FCC exercising its power to prescribe rates (charges) and revenue requirements.

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[9] End user charges or residential and single-line business users have been deferred until June 1985 and capped at $4.00 per month through 1990. Further Reconsideration Order, at paras. 4, 20. Multi-line business access charges, beginning at $6.00 per month were implemented on May 25, 1984. See Reconsideration Order, at para. 33.

The FCC and D.C. Circuit erroneously premised its defense of notice and comment proceedings in the case sub judice by reference to American Tel. and Tel. Co. v. FCC, 572 F.2d 17, 21-23 (2d Cir.), cert. denied, 439 U.S. 875 (1978). Access Charge Order, at para. 44, n. 18; NARUC v. FCC, No. 83-1225, slip op. at 53, NARUC Appendix A at 53. This case is inapposite, however, as it dealt with the FCC's authority to prescribe practices, not revenue requirements and rates to end users.

> The prescription of unlimited resale and sharing of private line services was an exercise of the FCC's authority under sec. 205(a) of the Communication Act to prescribe practices.

American Tel. & Tel. Co. v. FCC, supra, at 21 (Emphasis added).

The attempt by the FCC and D.C. Circuit to support the notice and comment procedures in the case sub judice under American Tel. & Tel. Co. v. FCC is in direct contravention of

the section 205(a) hearing requirement for prescription of charges determined in Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975).

In Nader v. FCC, the petitioners challenged an FCC order determining a rate of return for AT&T. The Court, citing FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 584, (1942), first emphasized that "prescribing rates involves a number of steps, one of which is the establishment of a fair rate of return." Nader v. FCC, at 201 (Emphasis added). Moreover, the Court held that "since the rate of return is one component of a charge, and the charges prescribed must properly reflect the allowable rate of return, the prescription of a rate is fully consistent with the prescription of charges." Id., at 204 (Emphasis added).

The Nader Court then turned to the procedural requirement of section 205(a):

> The essential elements of a valid prescription order are a full opportunity to be heard and finding that the

> action is just and reasonable. There can be no doubt that AT&T had a full hearing on the rate of return issue and has not appealed that determination.

Id., (Emphasis added; citations omitted).

The holding of the D.C. Circuit in Nader v. FCC lends itself to one simple conclusion, to wit, if a hearing is required under section 205(a) to determine one component of a rate or charge, then obviously an evidentiary hearing must be held to determine all components of a rate or charge.

Indeed, the D.C. Circuit has no quarrel with the above rationale. The Court acknowledged a plethora of FCC precedent mandating that an evidentiary hearing be held to satisfy the section 205(a) "opportunity to be heard" requirement:

> NASUCA points to cases in which the Commission has investigated the lengality of carrier-filed rate increases, see, e.g., In re AT&T, 57 F.C.C. 2d 960 (1976), determined a carrier's revenue requirements as part of an assessment of the legality of its charges, see In re AT&T, 9 F.C.C. 2d 30, modified, 9 F.C.C. 2d 960 (1967), or

> evaluated a carrier request to increase its prescribed rate of return. In re AT&T, 73 F.C.C. 2d 689 (1979).

NARUC v. FCC, No. 83-1225, slip op. at 54, NARUC Appendix A at 54.

The FCC's acknowledgement of the hearing and record requirements which 47 U.S.C. sec. 205(a) imposes upon the Commission when it prescribes rate and revenue requirements was further demonstrated in In re AT&T (the Telpak case), 61 F.C.C. 2d 587 (1976), aff'd in part, rev'd in part sub. nom., Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981). In the Telpak case, the Commission considered the revenue requirements and tariff levels of certain private line services offered by AT&T. It discussed the hearing and record requirements which section 205 imposes upon the FCC in its rate prescription authority as follows:

> Section 205(a) of the Communications Act give us authority to prescribe charges, classifications, regulations, and practices of communications common carriers. Any such prescription can only be made after full opportunity for hearing and upon a finding that the action taken is just and reasonable as supported by evidence of record.

AT&T, 61 F.C.C. 2d at 660-661 (Footnotes omitted). In the Telpak case, the "opportunity for hearing" and evidence of record required by section 205 consisted of approximately 2 years of evidentiary hearings including 53 witnesses and 27 thousand pages of transcript and exhibits. Id., at 595.

In the case sub judice, notwithstanding the Commission's reliance on the same section of the Communications Act (sec. 205) as it relied upon in the Telpak case, not one page of an evidentiary record exists to support this unprecedented prescription of rates and revenue requirements for end-user access charges. The strikingly different view the F.C.C. has taken in the instant case of

section 205's hearing and record requirements has resulted in the prescription of access charges without an evidentiary hearing on the components of those charges. For instance, what rate of return was employed by the Commission in determining the 1984 $8.5 billion revenue requirement which, subject to adjustment,[10] it found to exist? Upon what capital structure was such a return predicated? What investment level was used to compute that revenue requirement? What level of operating and maintenance expenses was used? What is the source of the Commission's assumption that approximately 100 million access lines exist?[11] What interpretations were employeed in the use of the Separations

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10 See, supra, n.8.

11 See Access Charge Order at para. 25.

Manual?[12] The FCC's failure to conduct an evidentiary hearing on these rudimentary ratemaking components as a predicate to the instant rate and revenue requirement prescription is an unprecedented departure and blatant violation of the sec. 205 "opportunity to be heard" requirement as defined by the above-cited FCC case and Nader v. F.C.C., supra.

The D.C. Circuit chose not to address the procedural scars wrought on these proceedings by the FCC's failure to conduct an evidentiary hearing on the ratemaking components comprising the access charges.

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[12] The Separations Manual is incorporated into the F.C.C.'s Rules, 47 C.F.R. sec. 67.1 (1979). See Jurisdictional Separations of Telephone Companies, 16 F.C.C. 2d 317, 331 (1969). The Manual was revised pursuant to the "Ozark Plan" recommended by the Federal-State Joint Board convened pursuant to 47 U.S.C. sec. 410(c). See Separations Procedures, 26 F.C.C. 2d 247 (1970).

Instead, and incredulously, the D.C. Circuit attempts to distinguish factually the instant case on the ground that the FCC did not prescribe rates or revenue requirements.

> [T]he FCC prescribed no specific revenue requirement and did not determine the legality of specific rates. On the contrary, the Commission initiated broad-gauged rulemaking to develop policies for the interstate long-distance market and it set prospective, policy-implementing rules.

NARUC v. FCC, No. 83-1225, slip op. at 54, NARUC Appendix A at 54.

NASUCA and SCCA respectfully submit that multi-line business end users currently paying a flat interstate access fee of $6.00 per line as a result of these proceedings would disagree with the D.C. Circuit's assessment. Residential and single-line business end users paying increased local rates for interstate access as of June 1985 as a result of these proceedings would also disagree with the D.C. Circuit's reasoning. It is an undisputed fact that the flat per

line end user access charges resulting from these proceedings are based on the aforecited revenue requirements projected by the FCC and represent a prescription of the above stated rates - not policies.

By the FCC's own admission, this case presents perhaps "the most difficult" and probably "the most important" problem ever to come before the agency. Access Charge Order, at para. 368; NARUC v. FCC, No. 83-1225, slip op. at 19 NARUC Appendix A at 19. The FCC and D.C. Circuit have repeatedly interpreted section 205(a) to require a hearing and evidentiary record as a predicate to the prescriptive authority of the Commission to set rates (charges) and revenue requirements. Petitioners respectfully request this Court to accept jurisdiction of this case on the ground that the Commission's failure to hold an evidentiary hearing in the instant revenue requirement and rate prescription case was an

extreme and unsubstantiated departure from the accepted and usual course of such Commission proceedings and that these procedurally defective proceedings have been erroneously affirmed by the D.C. Circuit.

CONCLUSION

For the reasons set forth herein, Petitioners NASUCA AND SCCA pray that a writ of certiorari be issued to the United States Court of Appeals for the District of Columbia.

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APPENDIX - STATUTES

47 U.S.C. sec. 151

Section 151. Purposes - Federal Communications Commission created. - For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purposes of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to

interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission" which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act. (June 19, 1934, c. 652, Title 1 § 1, 50 Stat. 189)

47 U.S.C. sec. 152(b)

(b) Except as provided in section 224 of this title and subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or

in connection with intrastate communication service by wire or radio or any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio

cc munication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise proviced therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

(As amended Feb. 21, 1978, Pub. L. 95-234, §5, 92 Stat. 35.)

47 U.S.C. sec. 205(a)

205. Commission authorized to prescribe just and reasonable charges - Penalties for violations - (a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any

charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall

conform to and observe the regulation or practice or prescribed.

47 U.S.C. sec. 410(c)

(c) Federal-State Joint Board; reference of proceedings regarding jurisdictional separation of common carrier property and expenses between interstate and intrastate operations and other matters relating to common carrier communications of joint concern; jurisdiction, powers, duties, and obligations; recommendation of decisions; State members; presence at oral arguments and nonvoting participation in deliberations; composition; Chairman.

The Commission shall refer any proceeding regarding the jurisdictional separa-

tion of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking and, except as provided in section 409 of this title, may refer another matter, relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board. The Joint Board shall possess the same jurisdiction, powers, duties, and obligations as a joint board established under subsection (a) of this section, and shall prepare a recommended decision for prompt review and action by the Commission. In addition, the State members of the Joint Board shall sit with the Commission en banc at any oral argument that may be scheduled in the proceeding. The Commission shall also afford the State members of the Joint Board an opportunity to participate in its deliberations, but not

vote, when it has under consideration the recommended decision of the Joint Board or any further decisional action that may be required in the proceeding. The Joint Board shall be composed of three Commissioners of the Commission and of four State commissioners nominated by the national organization of the State commissions as referred to in sections 302(b) and 305(f) of Title 49, and approved by the Commission. The Chairman of the Commission, or another Commissioner designated by the Commission, shall serve as Chairman of the Joint Board.

(As amended Sept. 30, 1971, Pub.L. 92-131, §2, 85 Stat. 363.)

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No. 84-504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF BELL OPERATING COMPANY RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. This Court ruled in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930), that local telephone exchange costs must be apportioned between those attributable to interstate service and those attributable to local service. The Federal Communications Commission issued orders setting guidelines for the manner in which such costs, once allocated to interstate service, may be recovered by local phone companies. To recover a portion of these costs, the guidelines would impose charges on end users who receive access to interstate service through the local exchange. Did the decision below affirm the Commission's orders consistently with *Smith*?

2. Section 205(a) of the Communications Act, 47 U.S.C. §205(a), requires a "full opportunity for hearing" before the Commission may prescribe carrier charges. Did the decision below correctly decide that the procedures employed by the Commission were proper in this particular case, where, after a comprehensive six-year notice and comment proceeding, the Commission issued policies and rules that govern all local telephone companies and set forth the manner in which certain of their charges are to be structured and calculated?

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IN THE

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OCTOBER TERM, 1984

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NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF BELL OPERATING COMPANY RESPONDENTS IN OPPOSITION

The Bell Operating Companies,[1] Respondents here, intervened below in the Court of Appeals for the District of

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[1] The following companies join in this Brief: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, Wisconsin Telephone Company, New Jersey Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, New York Telephone Company, New England

Columbia Circuit in support of the Federal Communications Commission. Respondents submit this Brief in Opposition to the Petition of the National Association of State Utility Consumer Advocates ("NASUCA") and the South Carolina Consumer Advocate ("SCCA") for a Writ of Certiorari to review the Court of Appeals' decision.[2]

STATEMENT OF THE CASE

The Federal Communications Commission determined in a series of orders that the existing rate structure for recovering the interstate costs of local telephone exchange facilities that provide access to the nationwide telephone network should be replaced and established guidelines for new charges to recover such costs.[3] The Court of Appeals' decision below unanimously affirmed those orders.[4]

A petition to review the decision below has already been filed by the National Association of Regulatory Utility

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Telephone and Telegraph Company, Pacific Bell, Nevada Bell, and Southwestern Bell Telephone Company.

Each of the foregoing Bell Operating Companies is a wholly owned subsidiary of a Bell Regional Holding Company, that is, American Information Technologies Corporation, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group or Southwestern Bell Corporation. Each Regional Holding Company has outstanding securities in the hands of the public.

[2] Petitioners will sometimes be collectively referred to herein as "NASUCA."

[3] The Commission's *Third Report and Order*, its initial access charge order, is reported at 93 F.C.C.2d 241 (1983). The Commission subsequently modified this order on reconsideration, 48 Fed. Reg. 42,984 (1983), and on further reconsideration, 49 Fed. Reg. 7810 (1984).

[4] *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984). The Court of Appeals affirmed the Commission's orders in principal part, remanding for further consideration two limited aspects of the orders irrelevant to the issues here.

Commissioners ("NARUC") in No. 84-95. NASUCA, like NARUC, contends that the decision below should be reviewed because the Commission's orders, as affirmed by the Court of Appeals, conflict with this Court's decision in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930). NASUCA also contends that, contrary to the decision below, the Commission's failure to hold an evidentiary hearing violated the "full opportunity for hearing" requirement of Section 205(a) of the Communications Act, 47 U.S.C. §205(a).

Respondents' statement of the case pertinent to NASUCA's *Smith v. Illinois Bell* contentions is set forth in their brief in Opposition to the NARUC Petition. Insofar as NASUCA contends the Court of Appeals improperly ruled on the hearing issue, however, the following matters bear statement here.

The Commission commenced the proceeding reviewed below with a *Notice of Inquiry* issued over six years ago.[5] Key issues in the proceeding were whether long-distance service should be subject to direct competition and, if so, what reimbursement interstate services should make to local operating companies for use of the local exchange. The undertaking was nothing short of a full inquiry into the economic and rate structure of long-distance telephone service. Four supplemental notices of inquiry and proposed rulemaking followed the initial notice, each representing a refinement of the Commission's understanding of the

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[5] *MTS and WATS Market Structure: Notice of Inquiry and Proposed Rulemaking*, 67 F.C.C.2d 757 (1984).

issues requiring resolution.[6] Ultimately, the record underlying the orders reviewed below filled 46 volumes and contained approximately 17,000 pages of submissions by more than one hundred different parties.

After three rounds of comments and reply comments, in which Petitioners here did not participate, the Commission, on August 1, 1980, adopted its *Third Supplemental Notice.* The Commission concluded that a general policy of open entry in domestic long-distance services would be in the public interest. Accordingly, it set about to determine the structure for a new system of access charges that would compensate local telephone companies for the use of their plant to provide access to long-distance calls.

On May 27, 1982, after a fourth round of comments and reply comments, in which Petitioners again did not participate, the Commission adopted its *Fourth Supplemental Notice.* This *Notice* proposed rate structures imposing access charges both on long-distance carriers and directly on end users. A central goal was to overcome the difficult task of devising a local company compensation scheme that appropriately balanced a policy of placing costs on the customers for whom the costs were incurred with a policy of avoiding immediate and burdensome economic impacts on some customers.

A significant influence on the Commission's conduct of this proceeding was the settlement of the United States' an-

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[6] *Supplemental Notice of Inquiry and Proposed Rulemaking,* 73 F.C.C.2d 222 (1979) (*"First Supplemental Notice"); Second Supplemental Notice of Inquiry and Proposed Rulemaking,* 77 F.C.C.2d 224 (1980) (*"Second Supplemental Notice"*); *Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking,* 81 F.C.C.2d 177 (1980) (*"Third Supplemental Notice"*); *Fourth Supplemental Notice of Inquiry and Proposed Rulemaking,* 90 F.C.C.2d 135 (1982) (*"Fourth Supplemental Notice").*

titrust suit against AT&T. The settlement was announced in January 1982, between the issuance of the *Third* and *Fourth Supplemental Notices.* The divestiture and exchange access provisions of the proposed settlement necessitated, as a practical matter, that the Commission render a decision by late 1982 and have its plan in place by early 1984, when divestiture and the reorganization of AT&T then was expected. Faced with the interests of 1500 independent telephone companies and the Bell Companies, as well as the interests of numerous other parties, the Commission established an "ambitious" timetable for itself aimed at meeting this deadline.[7]

Even before the exigencies triggered by the settlement of the AT&T antitrust suit, however, the Commission had considered and rejected requests for protracted evidentiary proceedings. As the Commission explained as early as its *First Supplemental Notice:*

> We have noted claims that evidentiary hearings will provide the most effective mechanism for accurate fact-finding. However, that type of multiparty proceeding could become almost interminable, given the complexity of the issues which

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[7] As the Commission stated in its *Fourth Supplemental Notice,* 90 F.C.C.2d at 154:

> We anticipate that a final order . . . will be issued by the end of this year [1982]. If this goal is realized, access charges based on [the order] can be designed and actually in place by the end of the following year [1983]. This timetable, while ambitious, is expected to be sufficient to allow development of an access charge that will resolve the major policy difficulties facing this Commission.

See also Third Report and Order, 93 F.C.C.2d at 246 (determining that the public interest required the Commission to set the basic structure for the access charges that would inevitably result upon divestiture).

> we must resolve. We are endeavoring to establish an entry policy for the 1980's. A procedural option which would preclude us from reaching a final decision at or near the beginning of that decade would not be consistent with that goal.[8]

Thus, with the AT&T settlement, the Commission's early concerns for timeliness became not only prescient but also imperative.[9]

After yet a fifth round of comments and reply comments, including, for the first time, a brief nine-page submission by Petitioners here, the Commission adopted a *Third Report and Order ("Access Charge Order")* setting forth its access charge plan.[10] It determined that an equitable allocation of costs required the imposition of a system combining carrier and end user charges. It, therefore, adopted "rules that will determine the rates interexchange carriers and end users will pay for access to local telephone company facilities. . . ."[11] The Commission also stated that it "expect[ed] access tariffs to be filed. . .

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[8] *First Supplemental Notice,* 73 F.C.C.2d at 232.

[9] Also bearing on the Commission's timetable during most of its proceeding was the duration of the so-called "ENFIA Agreement." Negotiated under Commission auspices, this agreement between local Bell companies and long-distance carriers other than AT&T provided for payments by these long-distance carriers to the local companies for use of the local exchange. The companies and carriers executed the agreement pending Commission establishment of an access charge plan, but it was due to expire in early 1984.

[10] 93 F.C.C.2d 241 (1983). As it had undertaken in its *Fourth Supplemental Notice,* the Commission adopted its order on December 27, 1982.

[11] *Id.* at 245-46. *See also id.* at 256 ("Although the rules we are adopting will not establish the precise charge for most access elements, we are establishing many of the steps that the carriers must follow in order to compute access charges").

in conformance with the rules adopted" and so ordered.[12] Notwithstanding the inclusion in the rules of limits on certain charges, these company tariffs, not the Commission's rules, would impose the actual access charges and would be themselves subject to review in subsequent proceedings.[13]

The Commission explained in the *Access Charge Order* that the Court of Appeals' decision in *American Telephone & Telegraph Co. v. FCC,* 572 F.2d 17 (2d Cir.), *cert. denied,* 439 U.S. 875 (1978), sanctioned the procedures it employed for adopting its access tariff guidelines. It also noted that the Court of Appeals' decision in *MCI Telecommunications Corp. v. FCC,* 627 F.2d 322 (D.C. Cir. 1980), excused absolute certainty and precision in the rates that would result from calculations in accordance with its guidelines and the cost recoveries those rates would effect.

Any serious error or misjudgment in the *Access Charge Order,* however, was subject to correction in reconsideration and further reconsideration proceedings, where the Commission twice responded to challenges to its plan and, as a result, substantially modified that plan.[14] Neither Petitioner NASUCA nor Petitioner SCCA participated in the pleading cycles on reconsideration and further reconsideration.

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[12] *Id.* at 246, 341.

[13] The Commission has commenced and partially completed just such proceedings. *See Investigation of Access and Divestiture Related Tariffs,* CC Docket No. 83-1145. There, too, Petitioners' participation has been minimal.

[14] *See generally Memorandum Opinion and Order,* 48 Fed. Reg. 42,984 (1983) (*"Reconsideration Order"*); *Memoradum Opinion and Order,* 49 Fed. Reg. 7810 (1984) (*"Further Reconsideration Order"*).

In light of the manner in which the Commission had conducted its proceedings, the Court of Appeals was not detained by Petitioners' claim on review below that the Commission had failed to conduct evidentiary hearings in accordance with Section 205(a) of the Communications Act. The court held that the Commission's comprehensive and extensive notice and comment procedures were sufficient "to develop policies for the interstate long-distance market and [to] set prospective, policy-implementing rules."[15] The court noted that the Commission neither set a specific revenue requirement for any carrier nor determined the legality of any specific carrier's rates.[16] It was careful not to express any opinion on whether the Communications Act or longstanding Commission policy calls for an evidentiary hearing where the Commission determines, for example, whether a carrier-filed rate is just and reasonable.[17] The court also found that the Commission itself had adequately explained its decision not to convene evidentiary hearings.[18]

SUMMARY OF ARGUMENT

Neither of the grounds advanced by Petitioners warrants a grant of their Petition. First, the Commission's orders and the Court of Appeals' affirmance do not conflict with *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930), or with any other decision of this Court or any other court of appeals. *Smith* only established the requirement that the costs of the local telephone exchange be

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[15] *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d at 1120.

[16] *Id.*

[17] *Id.* at 1121 n.29.

[18] *Id.* at 1121.

allocated for ratemaking purposes between state and federal jurisdictions. The Commission's orders below merely determined how local telephone exchange costs, already allocated to the Commission's interstate jurisdiction in compliance with *Smith,* are to be recovered.

Second, although an evidentiary hearing is required where, for example, a carrier invokes Section 205(a) when its rates are challenged, the Court of Appeals properly decided that the Commission's procedures here were adequate for developing the information necessary to establish guidelines governing the lawfulness of access charges. The Commission's procedures, moreover, developed the information necessary for the actions it took. This Court, therefore, is not confronted with an agency that has become unmindful of its procedural obligations or a court that has lost sight of the standards applicable to agency conduct. Indeed, Petitioners' claim that the Commission's procedures here are "unprecedented."[19] — a claim Respondents reject — belies any such deficiency and itself presupposes an agency quite sensitized to affording procedural safeguards. Finally, Petitioners' interests do not entitle them to an evidentiary hearing under Section 205(a), in any case, or support review here.

ARGUMENT

I. There Is No Conflict Between the Decision Below and This Court's Decision in *Smith v. Illinois Bell Telephone Co.*

This Petition adds nothing to the NARUC Petition's contention that the decision below conflicts with this Court's decision in *Smith v. Illinois Bell Telephone Co.*

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[19] Petition at 19.

The Bell Operating Company Respondents addressed this argument at pages 11-13 of their Brief in Opposition to NARUC's Petition, filed September 19, 1984 in No. 84-95.

Briefly, *Smith* merely required that the local exchange's costs be apportioned between those costs attributable to interstate service and those not so attributable. *Smith* did not address the discretion available to the Commission or the state utility commissions in establishing methods for recovering these costs once they are apportioned to the jurisdiction of each. *Smith*, therefore, simply does not bear on this case.

The Commission's end user charge is an interstate charge calculated to recover costs already apportioned to the interstate jurisdiction in full compliance with *Smith*. The fact that the end user charge may in effect operate as a condition of all telephone service, local and interstate, does not make it an intrastate rate. As discussed at greater length in Respondents' opposition to NARUC's Petition, because the same facilities are used for local and interstate service, local and interstate access are inseparable. Payment of the end user charge, therefore, is an unavoidable condition of local service. Accordingly, the Commission's action and the Court of Appeals' affirmance do not conflict with *Smith*, or with any other decision of this Court or any other court of appeals. Accordingly, review on this ground is unwarranted.

II. The Decision Below Correctly Affirmed the Commission's Orders.

NASUCA claims that the Court of Appeals incorrectly affirmed the Commission's decision not to institute evi-

dentiary hearings before establishing its policies for the structure of interstate service and its guidelines for computing access charges. The Court of Appeals, however, carefully distinguished the situation where a carrier-filed rate is subjected to Commission review, or where specific rates or revenue requirements are prescribed for a particular carrier, and properly determined that evidentiary hearings were not required in this particular case. In addition, the procedures followed by the Commission adequately developed the information necessary for the actions it took. Finally, NASUCA's interests neither entitle it to a protracted evidentiary hearing under Section 205(a) of the Communications Act nor support review here. NASUCA's second ground for review, therefore, also does not warrant a grant of its Petition.

A. The Court of Appeals Properly Determined That the Procedures Followed by the Commission in This Particular Case Were Sufficient for Commission Actions Establishing Policies for the Structure of Interstate Service and Guidelines for the Lawfulness of Access Charges.

The Commission established policies for the structure of interstate telephone service and guidelines that would assure the development of tariffs implementing its policies. Although the Commission did specify certain rate limitations for some end user charges during an initial transition period, basically the Commission established rules and procedures pursuant to which the many local exchange carriers were to compute and cost justify several thousand individual access rates. The Commission left the filing and review of actual tariffs – which would, in fact,

vary from company to company and from state to state — to a separate proceeding, which is now underway.[20]

Thus, although the Commission's orders imposed several requirements whose satisfaction would presumptively establish a tariff's lawfulness, the Commission, as the Court of Appeals determined, had adopted "policy-implementing rules" rather than determined specific revenue requirements or specific rates for particular carriers.[21] The court decided that the Commission's procedures sufficed for the adoption of such rules.[22] This decision was correct.

In assessing the sufficiency of the Commission's procedures, "the primary focus of [the] inquiry is . . . 'on the requirements of the particular case.' " *American Telephone & Telegraph Co. v. FCC,* 572 F.2d 17, 22 (2d Cir.), *cert. denied,* 439 U.S. 875 (1978).[23] Making this case-

[20] *See Investigation of Access and Divestiture Related Tariffs,* CC Docket No. 83-1145. NASUCA's Petition (at 20 n.9, 28) creates the misimpression that the Commission imposed a flat nation-wide multiline business access charge of $6 per line per month. The Commission, however, merely set $6 as the maximum allowable charge. The great majority of the Bell Operating Company Respondents actually filed tariffs for less than the maximum. Nationwide, the filed tariff charges ranged from $2.78 to the $6 maximum. In the states served by the C&P Telephone Company, the charges varied from $3.23 in Maryland to $4.14 in the District of Columbia, $5.34 in Virginia and $6.00 in West Virginia. These variations reflect the differing costs of service in the individual jurisdictions.

[21] *National Ass'n of Regulatory Utility Comm'rs v. FCC,* 737 F.2d at 1120.

[22] *Id.* at 1120-21.

[23] Petitioners claim that the Commission and the Court of Appeals improperly based their procedural decision on *American Tel. & Tel. Co. v. FCC* because that case involved practices while this case involves rates. By its terms, however, Section 205(a) of the Communications Act authorizes the Commission to invalidate both charges and practices and to prescribe the same. It also imposes the "full opportunity for hearing" requirement on all such actions. Petitioners'

specific determination required that the Court of Appeals, among other things, "distinguish between 'proceedings for the purpose of promulgating policy-type rules or standards . . . and proceedings designed to adjudicate disputed facts in particular cases.' " *Id.* Notice and comment proceedings are sufficient for the first category of proceedings, *id.* at 23, and, therefore, sufficed for the "policy-implementing rules" that the Court of Appeals determined had been adopted in the proceeding before it. *Accord Western Union Telegraph Co. v. FCC*, 665 F.2d 1126, 1151 (D.C. Cir. 1981) ("It is settled law that FCC policy decisions impacting, but not setting, rates may, when appropriate, be made in an informal rulemaking rather than an adjudicatory ratemaking proceeding").[24]

The nature of the interests involved in a proceeding plainly bears on its procedural treatment. Here, the tariffs

distinction, therefore, is without merit. The Court of Appeals' decision in *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975), moreover, does not dictate a contrary result. There, the Commission clearly replaced the rate of return element of a particular carrier's rates with a different rate of return prescribed by the Commission. As Section 205(a) required, the Commission had afforded the carrier an evidentiary hearing, and the carrier did not challenge the adequacy of the procedures afforded it.

[24]That the Commission's rules, moreover, would establish the lawfulness of tariffs developed in conformance with them did not change their legislative character or require their adoption pursuant to adjudicatory proceedings. *See United States v. Florida East Coast Ry.*, 410 U.S. 224, 246 (1973) (adjudicatory proceeding not required where rate setting decision was "applicable across the board to all . . . common carriers," there was "no effort to single out any particular [carrier] for special consideration based on its own peculiar circumstances," and decision was "for prospective application only, rather than adjudicating a particular set of disputed facts"); *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370, 388-89 (1932) (prospectively binding nature of rate setting order could not be ignored in order to subject complying carrier to reparations, even though order was issued in an evidentiary proceeding).

of neither one nor a few carriers were at issue. Rather, the broader interests of numerous parties – some 1500 local exchange carriers, several interstate carriers and countless end users – were implicated. The particular proceeding below, therefore, was simply not conducive to nor, indeed, appropriate for trial-type procedures.[25] The Court of Appeals, by carefully distinguishing the situation "where the Commission determines, for example, whether a carrier-filed rate is just and reasonable,"[26] showed proper sensitivity to the nature of the interests involved.[27]

In short, the Court of Appeals correctly assessed the adequacy of the Commission's procedures. The result it reached is amply supported under applicable law.[28] Re-

[25] *See United States v. Florida East Coast Ry.*, 410 U.S. at 245 (there is a "recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards . . . and proceedings designed to adjudicate disputed facts in particular cases"); *American Tel. & Tel. Co. v. FCC*, 572 F.2d at 23 (rejecting trial-type hearings where the issues involve "legislative" facts and forecasts that cannot be decisively resolved by testimony).

[26] *National Ass'n of Regulatory Utility Comm'rs v FCC*, 737 F.2d at 1121 n.29.

[27] As the Court of Appeals also determined, the Commission itself explained its decision to use notice and comment procedures. *See id.* at 1121.

[28] In this regard, NASUCA's reliance on Rule 17.1(a) of this Court is misplaced. The exercise of this Court's discretion under Rule 17.1(a) to address a departure from "the accepted and usual course of judicial proceedings," of course, is appropriate only in the discharge of the Court's responsibility for supervising the federal judicial system. *See generally* J. Moore, H. Bendix & B. Ringle, 13 *Moore's Federal Practice*, ¶817.27, at SC17-31 (2d ed. 1982). There is here, however, no claim of any departure from "the accepted and usual course of judicial proceedings." Indeed, the Court of Appeals properly ruled in accordance with applicable law. Rather, there is here merely an allegation of irregularity in the conduct of an administrative agency's proceedings and an ordinary request for this Court's review of a lower court's decision upholding the agency's procedures. Rule 17.1(a), therefore, is simply not applicable.

view here, therefore, is unwarranted. Indeed, the correction of procedural errors in federal agency proceedings is the customary province of the courts of appeals, and this Court will ordinarily not intervene in such matters.[29] Even were there error below, nothing here warrants a departure from this principle.

B. The Procedures Followed by the Commission Here Adequately Developed the Information Necessary for the Actions It Took.

Not only were the Commission's procedures lawful, as the Court of Appeals correctly decided, but also those procedures did, in fact, develop the information needed for the actions the Commission took. Indeed, the depth of the information the Commission developed probably went beyond what was necessary as a matter of law.

The extensive scope of the Commission's proceeding, in terms of the number of pleading cycles and volume of information submitted has already been recounted in the statement above. Moreover, a careful review of the proceeding's several notices and orders reveals not a chaotic amassing of information but an orderly and increasingly detailed evolution of the issues bearing on the Commis-

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[29] *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951); Friendly, J., *Mr. Justice Frankfurter*, 51 Va. L. Rev. 556 (1965); *See also Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("[t]his Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment [it is] asked to review"); R. Stern & E. Gressman, *Supreme Court Practice* 297-98 (5th ed. 1978) ("It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions. . . . Hence, the Court generally will not grant certiorari just because the decision below may be erroneous").

sion's ultimate actions and the identification of the information needed to resolve those issues.[30]

In many instances, necessary information was readily available to the Commission.[31] The Commission, however, was not content to leave acquisition of needed information to chance. It also provided certain assurances that all necessary information would be available, both to itself and parties participating in the proceeding.

For example, the Commission empowered the "Chief of the Common Carrier Bureau [to] direct certain carriers to submit empirical data and other information" and provided that "those information requests [would] be made available to participants in this proceeding."[32] The Commis-

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[30] *See, e.g., First Supplemental Notice,* 73 F.C.C.2d at 229, 231-32, 237-41; *Second Supplemental Notice,* 77 F.C.C.2d at 244, 246; *Third Supplemental Notice,* 81 F.C.C.2d at 178, 213-14; *Fourth Supplemental Notice,* 90 F.C.C.2d at 136-37, 145, 147-48.

[31] For example, the $8.5 billion estimated revenue requirement referred to in the *Access Charge Order,* 93 F.C.C.2d at 250, and characterized by Petitioners as without proper support, is merely the interstate revenue requirement for non-traffic sensitive plant derived from the so-called "jurisdictional separations process." *See id.* at 246. This process, which is recurring in nature, determines which local exchange costs are subject to state jurisdiction and which are subject to Commission jurisdiction. Thus, the Commission did not prescribe the $8.5 billion requirement in the proceeding reviewed below. It simply employed costs that had been readily determined pursuant to standards properly established in other proceedings, specified how those costs would be recovered, and used the costs to limit the access charges carriers themselves could lawfully file with the Commission. The Commission's reference to separate proceedings for this purpose was entirely within its discretion. This Court has stressed that regulatory agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *FCC v. Pottsville Broadcasting Co.,* 309 U.S. 134, 143 (1940). *See also Nader v. FCC,* 520 F.2d at 195-98.

[32] *First Supplemental Notice,* 73 F.C.C.2d at 232.

sion encouraged *ex parte* contacts with the Commission and its staff to assure an understanding of the matters being resolved.[33] To "encourage the development of a broadly based record," the Commission also decided to "supplement [its] usual public notice procedures by directing the Consumer Assistance Office to distribute copies of [the *First Supplemental Notice*] to consumer groups" like Petitioners here.[34] A device was even provided to enable participants to conduct limited discovery of carriers.[35]

Finally, the Commission directed the appropriate Commission staff to initiate its own concurrent examination.[36] In so doing, the Commission sought to rely on the expertise gained from no less than half a century of regulating telephone rates and practices.[37] This experience — which has included the review of countless tariffs, financial reports and line construction and extension requests — provided an intimate understanding of carriers' costs, their rate structures and the economics of telephone service generally.

Ultimately, the Commission's actions were subject to reevaluation upon reconsideration and even further reconsideration of the *Access Charge Order*. These two stages of the Commission's proceeding provided ample opportunity

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[33] *Fourth Supplemental Notice*, 90 F.C.C.2d at 155-56.

[34] *First Supplemental Notice*, 73 F.C.C.2d at 235.

[35] *Id.* at 244 ("We are . . . inviting persons who plan to submit reply comments to submit . . . requests for information to the Chief of the Common Carrier Bureau . . . . The Chief of the Common Carrier Bureau will then direct appropriate carriers to submit information to him which is responsive to information requests which he finds to be reasonable and relevant to this Inquiry"). After its utility had passed, this "discovery" device was discontinued. *See Second Supplemental Notice*, 77 F.C.C.2d at 225-26.

[36] *First Supplemental Notice*, 73 F.C.C.2d at 232.

[37] *See id.* at 231-32.

to identify deficiencies in needed information and, as the Court of Appeals found, to contest all information on which the Commission had based its decision.[38] Plainly, the Commission's procedures afforded the fullest opportunity to explore the issues and facts that was practically possible under the circumstances of this major inquiry.

To be sure, the Commission's procedures were not designed to guarantee an error-free result. That aim would only have crippled the administrative process and, in any case, was not required.[39] The Commission, however, was not unmindful of the possibility for error. It specifically provided that five years into the implementation of its access charge scheme, it "[would] evaluate the rules and policies adopted . . . and, if necessary, . . . make adjustments needed to promote the expressed goals of [its] proceeding."[40] Additional opportunity for rectification, moreover, was afforded through the Commission's proceedings in its Docket No. 83-1145, where the access

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[38] *See National Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d at 1121-22.

[39] *Cf. MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980) ("Ratemaking theories may change; new information may become relevant; one proceeding may have to take account of another. But there must be some reasonably prompt decisionmaking point at which the FCC says: 'To the best of our knowledge and expertise at this time, the rates are just and reasonable. Perfect, perhaps not, but just and reasonable, yes.' That is all the [Communications Act] requires").

[40] *Access Charge Order*, 93 F.C.C.2d at 244. *See United States v. Florida East Coast Ry.*, 410 U.S. at 242 (upholding nonadjudicatory procedure where agency "announced willingness to consider proposals for modification after operating experience had been acquired").

tariffs actually filed by carriers have been the subject of review.[41]

In short, the Commission's procedures did adequately develop the information necessary for its actions. The Court of Appeals, therefore, was fully justified in ruling that the procedures followed by the Commission in this case were proper.

C. Petitioners' Interests Neither Entitle Them to a Protracted Hearing Under Section 205(a) of the Communications Act Nor Support Review Here.

Section 205(a) of the Communications Act provides that the Commission may prescribe a rate or practice only when it determines "after full opportunity for hearing . . . that any charge, classification or regulation or practice of any carrier or carriers is or will be in violation of . . . [t]he Act." The "full opportunity for hearing" requirement of Section 205(a) exists essentially to protect the carrier. It basically serves as a procedural safeguard, designed to assure that the rates which the carrier is permitted to charge will cover its costs and allow it a fair return. In particular, a carrier's tariff cannot be replaced by a Commission prescription unless the Commission first finds an actual or incipient violation of the Act, and that finding may not be made unless the carrier insisting on an opportunity for a hearing has been afforded that opportunity.[42]

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[41] *See Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145.

[42] *See Nader v. FCC*, 520 F.2d at 204:

> The essential elements of a valid prescription order are a full opportunity to be heard and a finding that the action taken is just and reasonable . . . . There can be no doubt that AT&T had a full hearing on the rate-of-return issue and has not appealed that determination.

NASUCA itself, therefore, had no right to an evidentiary hearing pursuant to Section 205(a), even if one were required here.[43] Indeed, it would be quite an anomaly were NASUCA to have had such a right. Were it so, NASUCA could have demanded a trial-type hearing in the circumstances of this case, when it would not be entitled to a hearing upon its own complaint to the Commission about a carrier's rates pursuant to Sections 207-209 of the Communications Act.[44]

Moreover, NASUCA makes no claim that it was actually prejudiced by the procedures employed in the proceeding reviewed below or its outcome. Although its Petition here questions the basis for some of the Commission's findings, NASUCA does not claim it was unable to question those findings before the Commission itself. Nor does it now point to or claim that there was any other information the Commission's procedures prevented it from developing or challenging. Indeed, NASUCA's participation before the Commission is noticeable mostly for its virtual absence. Finally, NASUCA does not attempt to show how it or, more precisely, the interests it represents will be harmed by the Commission's access charge decisions.[45] In

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[43] *Cf. Illinois Citizens Comm. for Broadcasting v. FCC*, 515 F.2d 397, 403 (D.C. Cir. 1975) (Commission's improper denial of constitutionally required notice and hearing procedures prior to its obscenity determination against broadcast licensee cannot be asserted by public as procedural error).

[44] *See* 47 U.S.C. §§207-209; 47 C.F.R. §§1.701 *et seq.*

[45] In fact, it is not at all clear which interests, if any, NASUCA represents or how they have been prejudiced. End user interests vary and diverge. Certain end users support the Commission's access charge plan. For example, although NASUCA claims that multi-line business end users currently paying a $6 monthly access charge would reject the Court of Appeals' conclusion that the Commission did not determine the legality of specific rates (Petition at p. 21), the fact is

short, therefore, NASUCA has shown neither the injury to an arguably protected interest nor the "injury in fact" necessary to avoid ineligibility on standing grounds. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Sierra Club v. Morton*, 405 U.S. 727 (1972).[46]

At the same time, the affected carriers have made no complaint that their procedural rights under Section 205(a) have been violated or that they are otherwise prejudiced. It would be inappropriate, therefore, for this Court to grant certiorari to review such an issue at the behest of a noncarrier.

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that many of those end users accept the monthly charge. Since the monthly charge permits lower usage-based charges for interstate calls, it is on balance preferable to many multi-line business customers.

[46] Even if Petitioners had an arguable right to an evidentiary hearing and it were apparent how the Commission's procedures had prejudiced them, Petitioners' failure to show clearly how their constituents' interests have been injured by the substance of the access charge orders also precludes standing here. *Cf. Public Utilities Comm'n v. United States*, 356 F.2d 236, 241 (9th Cir. 1966) (failure to show deprivation of property precludes procedural due process claim based on denial of notice and opportunity to be heard).

CONCLUSION

For the foregoing reasons, this Court should not issue a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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No. 84-504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION

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BRIEF OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION

Pursuant to Rule 22.1 of the Rules of this Court, respondent American Telephone and Telegraph Company ("AT&T") opposes the petition for certiorari filed by the National Association of State Utility Consumer Advocates ("NASUCA") and the South Carolina Consumer Advocate.

STATEMENT OF THE CASE

This case arises out of a broad-gauged rulemaking proceeding conducted by the Federal Communications Commission to resolve major questions of policy. In the orders under review, the FCC established for the future a new industry-wide structure for interstate rates to recover the interstate costs of local telephone companies originating and terminating interstate calls. NASUCA's claim is that Section 205(a) of the Communications Act, 47 U.S.C. § 205(a)—which authorizes the FCC to prescribe charges for telephone service "after full opportunity for hearing"—required the Commission to utilize trial-type oral hearings rather than rely on evidence submitted in notice-and-comment rulemaking.[1] The Court of Appeals rejected that claim. Pet. App. 52a-55a.[2]

1. For many years, AT&T in cooperation with local telephone companies provided interstate telephone service in the United States. During this period, AT&T filed interstate rates with the FCC concurred in by the local companies and, out of the revenues generated, recouped its own costs and compensated the local companies for the use of their facilities in originating and terminating interstate calls.

Beginning in the 1970s, changes in federal policy led to the entry of other common carriers providing interstate telecommunications service (*e.g.*, MCI, Sprint, SBS) who also use local telephone company facilities to originate and terminate their calls. It quickly became clear that the

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[1] NASUCA also claims that the FCC lacked authority to provide, in the orders under review, that certain fixed interstate costs be recovered from end users through fixed monthly charges. This is the same claim made by NARUC in its petition in No. 84-95 and AT&T has responded to it in an opposition filed September 19, 1984.

[2] "Pet. App." refers to Appendix A to the petition for certiorari in *NARUC* v. *FCC*, No. 84-95, which also seeks review of the Court of Appeals' decision. Appendix A reprints the lower court's opinion.

local telephone companies were being compensated by different carriers and other users through a variety of *ad hoc* and inconsistent pricing arrangements. Accordingly, the FCC instituted this rulemaking (Docket No. 78-72) to determine central policy issues and establish a rate structure that would rationally and equitably divide the interstate costs of local telephone companies consistent with the FCC's objectives, including the preservation of universal service.

In Docket No. 78-72, the FCC was not concerned with setting the ultimate rates that particular local telephone companies would charge for the use of their facilities to originate and terminate interstate calls. Its task was to develop rate structure policies applicable across the board to all carriers and customers based on legislative-type judgments as to the interstate rate structure that would secure the FCC's goals. These policies, designed for prospective application, were to be implemented through tariffs filed by the local telephone companies subject to scrutiny and challenge under ordinary statutory procedures.

2. The FCC issued its notice of inquiry and proposed rulemaking in Docket No. 78-72 in 1978 and over the next four years the Commission refined the issues through four supplemental notices of inquiry. These notices, and other requests or opportunities for comment, elicited thousands of pages of submissions, including a vast amount of relevant factual information. The opportunity to submit such evidence was virtually unlimited. Scores of parties participated at one stage or another of the rulemaking proceedings, and the FCC received thousands of pages of comments on its proposed rules from members of the general public.

After an exhaustive review and thorough analysis of the comments, the FCC in February 1983 issued an order

adopting basic rate structure policies for recovering interstate costs of local telephone companies. This order was followed by a number of reconsideration petitions challenging various aspects of the Commission's plan, and in August 1983 the Commission revised its initial plan in several basic respects. After receiving further petitions for reconsideration, the FCC revised the plan still further in February 1984. See Pet. App. 27a-32a.

Under the Commission's plan, certain fixed interstate costs of the local telephone companies will eventually be paid through fixed monthly charges by end users who cause those costs.[3] End users are grouped into three classes—residential, single-line business, and multi-line business end users. Such charges for residential and single-line business end users are not yet in effect but will be phased in beginning in June 1985.[4] Charges for multi-line business end users have gone into effect and vary from company to company subject to a ceiling of $6 per month.[5] Those tariffs are presently under review in pending Commission proceedings.[6]

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[3] It is the end user charges, designed to recover those fixed costs caused by subscribers, which concern NASUCA. Under the FCC's plan, other fixed costs of the local telephone companies, attributable to specific interstate carriers, would be paid by those carriers. Traffic sensitive costs, which vary with the traffic generated by each interstate carrier, are ultimately to be apportioned among the interstate carriers on the basis of usage.

[4] Tariffs setting end user charges for residential users and single-line businesses have not been filed although the FCC has determined that those charges should not exceed $4.00 per line through 1990. In a proceeding still underway, the FCC is considering exemptions to this end user charge so far as may be necessary to protect universal service.

[5] Despite NASUCA's references to $6 as a rate (Pet. 20 n.9, 28-29), it is in fact a generally applicable *ceiling* and the actual rates filed by individual companies vary.

[6] Investigation of Access and Divesture Related Tariffs, FCC Docket No. 83-1145. See also Interstate Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Companies, FCC Docket No. 84-800.

3. When the FCC adopted its decision in Docket No. 78-72, numerous parties sought judicial review challenging different aspects of the decision. NASUCA did not itself petition for review but it did file an intervenor's brief seeking reversal. It claimed, so far as pertinent here, that Section 205(a) of the Communications Act, which authorizes the Commission to prescribe charges for telephone service "after full opportunity for hearing," required the Commission to utilize trial-type oral hearings rather than rely on notice-and-comment procedures.[7] In June 1984, the Court of Appeals issued a lengthy *per curiam* decision affirming the FCC on all of the basic questions presented below. Pet. App. 19.

In its decision, the Court of Appeals rejected NASUCA's claim of procedural error. It observed that the FCC was not prescribing specific revenue requirements or determining the legality of specific rates, but instead was undertaking "broad-gauged rulemaking to develop policies for the interstate [telephone] market and it set prospective, policy-implementing rules." Pet. App. 54a. The court found NASUCA's position unsupported by case law or past agency practice, and the court held that the procedures followed "in this extraordinary matter" were appropriate. *Id.* The court observed that requiring a trial-type hearing in a multi-party proceeding involving policy issues as complex as those here would have rendered the rulemaking "almost interminable," precluding the agency from establishing a policy for the 1980s. *Id.* at 55a.

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[7] During the agency proceeding NASUCA had not asserted that trial-type oral hearings were required by statute, nor identified specific issues warranting such hearings. Instead, in a single pleading filed four years after Docket No. 78-72 had begun, NASUCA simply said in general terms that it thought that the importance of the case warranted "an oral argument or evidentiary proceeding." NASUCA Response to Fourth Supplemental Notice of Inquiry, August 6, 1982, p. 8.

SUMMARY OF ARGUMENT

Certiorari is not warranted in this case. Sup. Ct. R. 17. NASUCA's claim that Section 205(a) required the FCC to utilize trial-type oral hearings is untenable in light of *United States* v. *Florida East Coast Railway*, 410 U.S. 224 (1973). This Court there construed a similar rate setting provision of the Interstate Commerce Act and held that notice-and-comment procedures suffice where an agency is designing industry-wide rates for future application. The decisions of the Courts of Appeals squarely support notice-and-comment procedures for policy-implementing agency rulemaking.

In this case, the FCC accumulated a vast amount of evidence through its notice-and-comment procedures. This course was well within its discretion in view of the prospective policy-related character of the issues and the industry-wide scope of the proceeding. The reasons belatedly offered by NASUCA for an evidentiary hearing are unpersuasive, measured against the discretion of the agency in structuring its own proceedings. The main issues listed by NASUCA as appropriate for an evidentiary hearing primarily relate not to the docket now under review but to the tariff proceedings that are currently underway at the agency and are not yet final.

ARGUMENT

I. Section 205(a) Imposes No General Obligation on the FCC To Employ Trial-Type Oral Hearings To Determine Industry-Wide Policy for the Future, and Neither Appellate Decisions Nor Prior FCC Practice Establish Such a Requirement.

NASUCA's basic procedural claim is that Section 205(a) required the FCC to utilize a trial-type oral hearing in this case. Pet. 17-30. That section empowers

the FCC to prescribe charges "after full opportunity for hearing." The difficulty with NASUCA's reliance on Section 205(a) is that this Court rejected precisely the same argument in *United States* v. *Florida East Coast Railway*, 410 U.S. 224 (1973). This Court there held that Section 1(14)(a) of the Interstate Commerce Act did not require the ICC to hold trial-type oral hearings before establishing incentive per diem rates for rail carriers.

This Court in *Florida East Coast* upheld the agency's use of notice-and-comment rulemaking because the incentive rates were "applicable across the board to all of the common carriers by railroad subject to the Interstate Commerce Act," and "[n]o effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances." 410 U.S. at 246. The decision noted that the factual determinations the agency made were for use in "the formulation of a basically legislative-type judgment, for prospective application only, rather than in adjudicating a particular set of disputed facts." *Id.* That language applies with equal force in the present case.[8]

The FCC, in determining future policy through rulemaking proceedings, has repeatedly decided industry-wide issues without trial-type oral hearings. The Courts of Appeals have repeatedly sustained such decisions. Examples include the FCC's introduction of intercity private line competition, the creation of a registration program for customer-provided terminal equipment, and the decision

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[8] *Florida East Coast*'s analysis was applied to Section 205(a) in *AT&T* v. *FCC*, 572 F.2d 17, 22-23 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978), where the Second Circuit found that trial-type oral hearings were not required for decisions establishing industry-wide, prospective policy.

to detariff enhanced services and terminal equipment.[9] The FCC's procedures in this case were therefore consistent with its own prior practice in resolving major policy issues, as well as with judicial precedent.

NASUCA asserts that in a prior FCC proceeding, reviewed in *Nader* v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975), the FCC did employ a trial-type evidentiary hearing in exercising its power to determine an appropriate rate of return for AT&T. *Nader* involved the setting of a rate of return for an individual company, however, not the establishment of industry-wide policy; as the Court of Appeals observed in this case, "the FCC [here] prescribed no specific revenue requirement and did not determine the legality of specific rates." Pet. App. 54a. More important, *Nader* did not hold that the FCC was *required* to have an evidentiary hearing even in the proceeding there involved, for no such issue was ever raised in the case.[10]

Similarly, there is no basis for NASUCA's claim that the FCC has acknowledged the need for trial-type oral hearings in prior FCC proceedings similar to this one. The main case cited by NASUCA (Pet. 24-25) involved solely a decision on the lawfulness of the particular rates used by a single carrier.[11] Trial-type oral hearings in cases

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[9] *E.g., Computer and Communications Industry Ass'n* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983); *AT&T* v. *FCC*, *supra*; *North Carolina Utilities Comm'n* v. *FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *Washington Utils. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[10] The *Nader* language quoted by NASUCA (Pet. 22-23) was in fact addressed to the question whether the FCC had power to prescribe rates of return. AT&T had not challenged the procedure used and the court therefore had no occasion to decide what minimum procedures would be appropriate.

[11] *In re AT&T*, 61 F.C.C.2d 587 (1976), *aff'd in part and rev'd in part*, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981).

involving the specific rates of a specific carrier might arguably be required under *Florida East Coast,* but this is not such a case. Even if the two proceedings were identical (which they are not), "[t]he mere fact that an agency has once regarded evidentiary hearings as appropriate does not bar it from adopting another policy when changing or new circumstances require a different approach."[12]

In sum, NASUCA has no support for its claim that Section 205(a) or prior precedent and practice required trial-type oral hearings in this case. There is no conflict with any decision of this Court or any other Court of Appeals. On the contrary, the decisions of both (*e.g., Florida East Coast; AT&T* v. *FCC*) support the Commission and confirm the correctness of the affirmance below.

II. NASUCA's Claim That an Oral Hearing Was Required in the Particular Circumstances of This Case Is Mistaken and Does not Present any Issue Appropriate for Review by This Court.

NASUCA appears to suggest that the facts of this case required a trial-type oral hearing even if it was not generally required by statute or past practice. But it is now settled under *Vermont Yankee* that the agency has substantial discretion in applying provisions of the act it administers and devising the procedures for doing so.[13] The FCC had ample basis in this case for employing notice-and-comment procedures and it did not abuse its discretion under the *Vermont Yankee* standard.

In this case, the FCC was not resolving a narrowly focused factual issue concerning an individual carrier where adjudicative procedures might be useful. Rather, it

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[12] *Bell Telephone Co.* v. *FCC,* 503 F.2d 1250, 1265 (3d Cir. 1974), *cert. denied,* 422 U.S. 1026 (1975).

[13] *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 543-48 (1978). See also *Chevron, U.S.A.* v. *NRDC,* 104 S. Ct. 2778 (1984).

was making legislative-type judgments in setting policy for the entire industry. Given the range and nature of the issues, the number of parties, and the need to examine successive modified proposals, notice-and-comment rulemaking was eminently suited to the agency's task. Even with this efficient procedure, Docket No. 78-72 took six years. It is doubtful whether the proceeding would ever have been completed if trial-type oral hearings had been employed.[14]

The notice-and-comment procedures utilized by the FCC did not deprive it of evidence. Enormous quantities of evidence, including detailed statistics, financial information, descriptions of new developments in the industry, instances of threatened harm, and the like, were presented in numerous comments. The FCC took this information into account both in structuring its original plan and in modifying it several times. The court below specifically held that the FCC's determinations were "rationally grounded and sufficiently supported by evidence." Pet. App. 19a. Because the FCC could secure the necessary information in this way, its decision to use notice-and-comment rulemaking was clearly rational.

Nevertheless, NASUCA asserts that a trial-type oral hearing was required because of the importance of the case. Pet. 29-30. But the utility of trial-type hearings does not depend on the abstract importance of a case but on the nature of the issues, the scope of the proceeding, and the nature of the action proposed.[15] As *Florida East Coast*

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[14] The FCC stressed the need to place a new rate structure into effect before the adverse consequences of the existing system of *ad hoc* compensation arrangements became irreversible. See Pet. App. 31a.

[15] See, *e.g., Florida East Coast Railway, supra,* 410 U.S. at 245 (question is whether proceeding is "for the purpose of promulgating policy-type rules or standards, on the one hand," or "to adjudicate disputed facts in particular cases on the other"). See also *AT&T* v. *FCC, supra,* 572 F.2d at 22; 1 K. Davis, *Administrative Law Treatise,* § 6:23 at pp. 561-62 (2d ed. 1978); Friendly, "Some Kind of Hearing," 123 *U. Pa. L. Rev.* 1267, 1314-15 (1975).

made clear, trial-type oral hearings may be required to adjudicate a narrow factual claim involving a single party and yet be wholly unwarranted for determining broader and more far-reaching issues affecting a whole industry or market. 410 U.S. at 244-46.

General determinations of policy, based on legislative-type considerations, are the least appropriate subjects for trial-type oral hearings. As Judge Leventhal said in an analogous context, such issues involve expert opinion and forecasting and "cannot be decisively resolved by testimony."[16] Practically all of the most important policy decisions by the Commission in recent years have, as already noted, employed the same procedures used in this case, namely, notice-and-comment rather than trial-type oral hearings. The decisions thus reached have been sustained in circuit after circuit and this Court has repeatedly denied certiorari. See p. 8, n. 9, above.

NASUCA's other argument for trial-type oral hearings in this case rests on its list of six issues it now says should have been the subject of such a hearing. Pet. 26-27. The principal issues specified by NASUCA are the "capital structure" for telephone companies, their "investment level," their proper "[rate of] return," and their "level of operating and maintenance expenses." Pet. 26.[17] These are, of course, matters that vary from company to company in the industry and bear on the specific tariff rates ultimately charged by those companies. Such questions were not and did not have to be decided in order to

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[16] *American Airlines* v. *CAB*, 359 F.2d 624, 633 (D.C. Cir.) (*en banc*), *cert. denied*, 385 U.S. 843 (1966), quoted in *AT&T* v. *FCC*, *supra*, 572 F.2d at 23.

[17] The Commission clearly did not need to have a trial-type oral hearing in order to interpret its own Separations Manual, or to estimate the number of telephone lines in the country. Compare Pet. 26-27.

resolve the basic questions of industry-wide policy and rate structure with which the FCC was concerned in this docket.[18]

The FCC in substance resolved the policy and rate structure issues in this docket and then left the local telephone companies to frame and submit tariffs consistent with this new structure. The *Nader* case, relied on by NASUCA itself, is one of many precedents affirming the agency's authority to decide only issues essential to the case before it and to reserve other issues for subsequent proceedings. See 520 F.2d at 195-96. Here, the Commission proceeded rationally by determining the issues of rate structure in this docket and reserving for individual tariff proceedings other questions bearing on the lawfulness of the individual rates offered by the local telephone companies.[19]

Finally, the question whether the FCC acted rationally and within its discretion in selecting procedures to resolve this case is clearly not a question appropriate for review on certiorari. On such a particularized question, there is and can be no conflict with prior decisions of this Court or a Court of Appeals in any other circuit. To the extent prior decisions are relevant, *Vermont Yankee* established a standard of deference to the agency in its choice of procedures and the lower court respected that discretion in this case. There is no warrant for further review.

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[18] The issues of concern to the FCC were, for example, whether to make cost-causing customers pay their own costs; whether to provide a discount for allegedly inferior access; whether to impose a cap on end user charges; whether to require FX users and "leaky PBX" users to contribute to interstate costs; whether and when to allow rate averaging and whether to establish a universal service fund.

[19] NASUCA repeatedly refers to the FCC's estimate that certain fixed interstate costs will be "approximately $8.5 billion in 1984" as if this were a component of a final determination of a specific rate for a specific company. Pet. 19, 26-27. In fact, the figure was merely a gross estimate of the pertinent costs of all local telephone companies taken together; it did not determine the actual revenue requirement of any individual company, a matter which will be resolved in the tariff proceedings.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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October 26, 1984

RULE 28.1 LISTING

American Telephone and Telegraph Company, which has no parent company, retains a minority interest in two companies that have outstanding securities in the hands of the public - Cincinnati Bell Inc. and The Southern New England Telephone Company.

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CLERK

No. 84-504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, *et al.*
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM IN OPPOSITION FOR MCI TELECOMMUNICATIONS CORPORATION

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MEMORANDUM IN OPPOSITION

Pursuant to Rule 22.1 of the Rules of this Court, respondent MCI Telecommunications Corporation ("MCI") opposes the petition for certiorari filed by the National Association of State Utility Consumer Advocates and the Southern Carolina Consumer Advocate. MCI relies upon the Brief in Opposition that it filed on August 17, 1984 in No. 84-95, *National Association of Regulatory Utility Commissioners v. Federal Communications Commission and United States of America, et al.* (The listing required by Rule 28 of this Court may be found in that document.)

Respectfully submitted,

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No. 84-504

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES AND STEVEN W. HAMM, CONSUMER ADVOCATE FOR THE STATE OF SOUTH CAROLINA, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

This case raises questions as to the validity of certain aspects of the FCC's end-user access charge plan, which provides for the recovery of a part of the cost of local telephone company equipment. A large portion of that equipment is used for both intrastate and interstate service; part of the cost of such equipment is "non-traffic-sensitive" — *i.e.*, does not vary with extent of use. The Commission has adopted a plan pursuant to which most of the portion of these non-traffic-sensitive costs that is allocated to the "interstate jurisdiction" will be recovered through a flat access fee payable by all telephone subscribers, whether or not the particular subscriber makes interstate calls.

The questions presented by the petition are:

(1) Whether this end user access charge plan is consistent with *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 113 (1930).*

(2) Whether the Commission's use of notice and comment rulemaking in this proceeding afforded the "full opportunity for hearing" required as a predicate for certain Commission actions under Section 205(a) of the Communications Act, 47 U.S.C. 205(a).

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*The first question presented by the instant petition is the same as that presented by the petition in No. 84-95, *National Ass'n of Regulatory Utility Commissioners* v. *FCC*, which also seeks review of the judgment of the court of appeals challenged here. We have discussed that issue in our response in No. 84-95, and accordingly confine this response to the second question presented.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-504

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES AND STEVEN W. HAMM, CONSUMER ADVOCATE FOR THE STATE OF SOUTH CAROLINA, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (84-95 Pet. App. 1a-110a) is reported at 737 F.2d 1095.[1] The orders of the FCC are reported at 93 F.C.C. 2d 241 (Report and Order), 48 Fed. Reg. 42984 (1983) (Order on Reconsideration), and 49 Fed. Reg. 7810 (1984) (Order on Further Reconsideration).

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1984. The petition for a writ of certiorari was filed on September 7, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

[1]Hereinafter "Pet. App." denotes the appendix to the petition for a writ of certiorari in the related case, No. 84-95. See page i note *, *supra*.

STATEMENT

This case, like *National Association of Regulatory Utility Commissions* v. *FCC*, No. 84-95, arises from rulemaking proceedings undertaken by the Federal Communications Commission to determine, inter alia, how local telephone companies should recover the "interstate" portion of the fixed costs of those local exchange facilities that are used both for interstate and intrastate telephone service.[2] In the first phase of these proceedings, commenced in 1978, the Commission concluded that an open market structure and free competition in the interstate telecommunications industry would serve the public interest and advance the policies of the Communications Act. Then, in a series of orders generally known collectively as the "*Access Decision*," the Commission endorsed a new system of fixed monthly charges to allow recovery, directly from telephone subscribers, of most of the interstate share of the costs of non-traffic-sensitive jointly-used local exchange facilities. But the Commission did not actually approve tariffs or fix rates for any class of telephone subscribers in the *Access Decision*. Indeed, tariffs imposing end-user charges on residential and single-line business users have yet to become effective. Access charge tariffs for multiple-line business service have gone into effect, but are presently under review in separate Commission proceedings. The only actual dollar amount finally established as part of the *Access Decision* is a *ceiling* of $6 per month for multiple-line business service access charges.

The Commission rendered its *Access Decision* orders at the close of five years of study of the underlying issues and the comments of interested parties. The scope of the inquiry was defined by a notice of inquiry and proposed rulemaking

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[2]The pertinent technical and regulatory background is described in the government's brief in opposition in No. 84-95.

and four supplemental notices. At least 85 parties, including petitioners, filed written comments at some stage of the proceeding. These comments were analyzed and addressed by the Commission in its Report and Order. The Commission then entertained petitions for rehearing, issued an order on reconsideration, accepted further rehearing petitions, and entered an order on further reconsideration.

Numerous petitions for review of the Commission's *Access Decision*, raising a wide variety of claims, were filed in the United States Court of Appeals for the District of Columbia Circuit. The court of appeals affirmed the agency's action in all but minor respects. Specifically, as explained in our brief in No. 84-95 (at 5-6), the court of appeals rejected the claim, advanced here, that the Commission's ruling is inconsistent with *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133 (1930). In addition, the court of appeals rejected (Pet. App. 52a-56a) petitioners' argument that either Section 205(a) of the Communications Act, 47 U.S.C. 205(a), or longstanding agency procedures, departure from which was impermissible, required the Commission to undertake a trial-type evidentiary hearing as the predicate for the rulings under review. The court found no general requirement for trial-type hearings in Section 205(a), emphasizing that whatever procedure might be required in an adjudicatory proceeding to determine whether a particular carrier's rate is lawful, no trial-type hearing was required as a basis for the *Access Decision*, because (Pet. App. 54a)

> the FCC prescribed no specific revenue requirement and did not determine the legality of specific rates. On the contrary, the Commission initiated broad-gauged rulemaking to develop policies for the interstate long-distance market and it set prospective, policy implementing rules.

The court of appeals also observed that no Commission precedent or longstanding practice reflects any requirement for a trial-type hearing in a proceeding similar to that undertaken in this case (Pet. App. 54a-55a).

ARGUMENT

No question that warrants further review is presented by the procedures employed by the Commission culminating in its *Access Decision*. The decision of the court of appeals sustaining the agency's procedures does not conflict with any decision of this Court or any other court of appeals. Indeed, petitioners do not assert otherwise. Rather their claim is simply that "prior FCC and D.C. Circuit cases * * * mandate a trial type evidentiary hearing" in the circumstances of this case (Pet. 20; see also Pet. 29).[3]

1. Section 205(a) of the Communications Act, 47 U.S.C. 205(a), authorizes the Commission to prescribe charges, classifications, regulations and practices "after full opportunity for a hearing." Petitioners' claim is that the Commission was required to hold a trial-type evidentiary hearing in this case. Yet petitioners do not suggest that the statutory language on its face requires anything more than a timely opportunity to be heard such as was afforded by the notice and comment rulemaking procedures employed here. Nor would any such claim be tenable in the face of *United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973), and *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), which make clear that a bare statutory requirement that a "hearing" precede agency action does not mandate use of trial-type procedures. See, *e.g. Sea-Land Service, Inc.* v. *Federal Maritime Commission*, 653 F.2d 544, 551 (D.C. Cir. 1981); *Mobil Oil Corp.* v. *Federal Power Comm'n*, 483 F.2d 1238, 1250 (D.C. Cir. 1973). Nor do

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[3]See page i note *, *supra*.

petitioners claim that pertinent legislative history supports their reading of the hearing requirements of Section 205(a).

Petitioners' claim that trial-type hearing procedures were required here is based solely upon the assertion that it is supported by decisions of the United States Court of Appeals for the District of Columbia Circuit and of the FCC (Pet. 20, 29).[4] Petitioners' contention is both irrelevant and unfounded. It is irrelevant because this Court does not sit to resolve intracircuit (much less intra-agency) conflicts, and because administrative agencies are free to revise their views on legal questions, including procedural ones, in the light of their experience. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 25; *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 7-8; *NLRB* v. *Iron Workers*, 434 U.S. 335, 351 (1978). Moreover, absent a constitutional or statutory basis for requiring the use of trial-type procedures, the courts are generally without authority to force a particular " 'method[] of inquiry' " upon the agency. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 543 (1978) (citation omitted).

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[4]Petitioners attempt (Pet. 21) to distinguish this case from *American Telephone & Telegraph Co.* v. *FCC*, 572 F.2d 17 (2d Cir.), cert. denied, 439 U.S. 875 (1978), which held, in an analagous context, that notice-and-comment rulemaking procedures satisfied the requirements of Section 205(a), and which the court of appeals below cited as consistent with its decision (Pet. App. 53a). But petitioners do not even suggest that the Second Circuit's decision supports their contentions here. In any event, even petitioners' more modest contention, that the Second Circuit case is distinguishable, is unfounded. Petitioners assert that the earlier case is distinguishable because it dealt with a Commission proceeding to regulate practices rather than actual rates (Pet. 21). But, on its face, Section 205(a) applies the very same hearing requirement to rate regulation and regulation of practices.

Petitioners' contention that the Commission and the court of appeals have deviated from their own precedents regarding the requisites of the statutorily mandated hearing is, in any event, incorrect. *Nader* v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975), on which petitioners place primary reliance (Pet. 22-23), is wholly inapposite. There the court of appeals simply commented that the hearing requirement of Section 205(a) had been satisfied. Although a formal evidentiary hearing had been held, the Court did not address the question whether that kind of procedure was required by Section 205(a). Similarly, nothing in the Commission's opinion in *In re AT&T*, 61 F.C.C. 2d 587 (1976), aff'd in part *sub nom. Aeronautical Radio, Inc.* v. *FCC*, 642 F.2d 1221 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981), addressed the questions whether, or in what circumstances, notice-and-comment procedures satisfy the hearing requirement of Section 205(a).[5]

2. Petitioners' contentions are based largely upon a mischaracterization of the Commission's proceedings. In petitioners' view, the Commission's *Access Decision* effects a "prescription of rates and revenue requirements" (Pet. 17; see also *id.* at 25). But in the proceeding under review the Commission did not approve tariffs or fix rates to be charged by any particular carrier or to be paid by any particular class of telephone subscribers. Instead, the Commission simply determined the structure of the system under which *all* local telephone operating companies are to recover the interstate portion of the cost of non-traffic

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[5]Moreover, both *Nader* and *In re AT&T* grew out of Commission proceedings to prescribe or review an actual rate of a particular carrier, rather than proceedings to fashion broad policies applicable to an entire industry. Thus, to the extent that those cases might be interpreted as suggesting that Section 205(a) requires an evidentiary hearing in the former class of cases (see pages 7-8, *infra*), they provide no support for requiring a formal evidentiary hearing in the instant case.

sensitive local plant equipment from subscribers generally. The Commission determined, as a matter of general policy, that these costs should be recovered in substantial part through flat access charges paid by telephone subscribers. The precise amount of the charges was not determined for any class of service in the proceeding under review; moreover, the only final determination affecting the actual level of the tariffs to be entertained subsequently was that the access charge for multi-line business service should not exceed $6 per month. Actual charges will be determined in subsequent proceedings in which rates filed by various carriers are subject to review. Accordingly, the court of appeals correctly determined (Pet. App. 54a) that the Commission had not "determine[d] the legality of specific rates" and had, instead, properly engaged in "rulemaking to develop policies for the interstate long—distance market" leading to adoption of "prospective, policy-implementing rules."[6]

Given the nature of the proceeding at issue, petitioners' contentions are contrary to *Florida East Coast Ry., supra.* There the Court upheld the Interstate Commerce Commission's promulgation, on the basis of notice-and-comment rulemaking, of certain incentive per diem charges to be paid by carriers for the use of another carrier's box cars, "applicable across the board to all of the common carriers by

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[6]Notwithstanding the facts that we have summarized here, petitioners insist (Pet. 28) that "multi-line business end users currently paying a flat interstate access fee of $6.00 per line" would "disagree with the D.C. Circuit's assessment" of the nature of the proceedings. But nothing in the *Access Decision* requires carriers to charge an access fee of $6/month or binds the Commission to approve a rate of $6 in every case; indeed, rates filed by individual carriers have in many instances been substantially below the $6 ceiling. Because petitioners do not suggest that the $6 ceiling is too *low*, they cannot argue that the *Access Decision* forecloses case-by-case consideration of actual rates filed within the policy framework created by the *Access Decision.* Thus they do not challenge the one dollar-specific aspect of the *Access Decision.*

railroad subject to the Interstate Commerce Act" (410 U.S. at 246). There, as here, the issue confronted by the administrative agency (a nationwide chronic shortage of freight cars due to the lack of financial incentives for each carrier promptly to return box cars belonging to other carriers) affected the operations of the entire industry. The Court held that the applicable hearing requirement (contained in the Interstate Commerce Act) was satisfied in these circumstances by the rulemaking procedures employed by the Commission (410 U.S. 245-246):

> [T]he incentive payments proposed by the Commission in its tentative order, and later adopted in its final order, were applicable across the board to all of the common carriers by railroad subject to the Interstate Commerce Act. No effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances.

The resulting agency action was characterized as "formulation of a basically legislative-type judgment, for prospective application only, rather than * * * adjudicati[on of] a particular set of disputed facts" (*id.* at 246). The Federal Communications Commission's *Access Decision*, the product of notice-and-comment rulemaking, likewise satisfies the applicable statutory hearing requirement.

3. Petitioners contend (Pet. 19-20, 29) finally that further review is warranted in this case because of the practical importance of the Commission's *Access Decision*. But we are unaware of any authority that suggests that statutory hearing requirements vary according to the perceived practical importance of the matter under consideration. To the extent that petitioners' argument for further review depends upon their disagreement with the Commission's policy judgments and is divorced from the issue presented for review, we urge, as we did in No. 84-95 (Gov't Br. in Opp. 12 & n.5), that the issue is committed to the political branches

of government. Deference to the political branches is especially appropriate here because of the close scrutiny the Commission's *Access Decision* has received at the hands of Congress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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